In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-391

RONALD EDWARD SHAFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted on ten counts of an eleven-count indictment—count nine was dismissed on the government's motion—charging violations of the National Firearms Act and the Gun Control Act. Counts I and II charged that petitioner, who was a licensed firearms dealer in Illinois, sold a pistol to a man known to him to be a convicted felon and not a resi-

dent of the state of Illinois in violation of 18 U.S.C. 922(b)(3) and 922(d)(1). Counts III and VI charged that on two occasions petitioner sold hand grenades without keeping the required records in violation of 18 U.S.C. 922(b)(5). Counts V, VIII, and XI charged that petitioner possessed unregistered hand grenades in violation of 26 U.S.C. 5861(d), and Counts IV, VII, and X charged that petitioner transferred hand grenades without filing the required application in violation of 26 U.S.C. 5861(e). He was sentenced to five years' imprisonment on each of Counts I, II, III, and VI (the Title 18 counts) and ten years' imprisonment on each of Counts IV, V, VII, VIII, X and XI (the Title 26 counts). All of the sentences were made to run concurrently. The court of appeals affirmed (Pet. App. A).

Petitioner principally contends that his conviction on each count except I and II is invalid because compliance with statutory registration and filing requirements would have required him to incriminate himself under the Fifth Amendment. This Court, however, held in *United States* v. *Freed*, 401 U.S. 601, that 26 U.S.C. 5861(d) does not violate the Fifth Amendment as to a possessor or transferee of firearms. Three of the counts on which petitioner received ten-year sentences (V, VIII, and XI) charged him with possession under Section 5861(d); hence they were valid under *Freed*. Petitioner argues that *Freed* does not apply to the three counts under 26 U.S.C. 5861(e) in which he was convicted as a transferor. There is no need to consider this claim since

petitioner's sentence is fully supported by the Section 5861(d) counts. *Benton* v. *Maryland*, 395 U.S. 784. In any event, it is our position that the use immunity provision of 26 U.S.C. 5848 and the government's policy of non-disclosure outlined in *Freed* (401 U.S. at 605-606) provide adequate protection to the transferor as well as the transferee. Cf. Memorandum for the United States in Opposition in *Lauchli* v. *United States*, No. 71-5064 this Term, a copy of which we are sending to petitioner.[1] Moreover, only lawful transactions require compliance with the registration provisions of the Act (26 U.S.C. 5812) thus precluding any claim of self-incrimination by an illegal transferor.

Since the sentence under any one of the Title 26 counts discussed above is sufficient to support the total ten-year sentence, there is also no need for the Court to reach the validity of the convictions for unlawful sale of grenades in violation of 18 U.S.C. 922(b)(5) under Counts III and VI. We note, however, that it is the policy of the Department of Justice not to prosecute under 18 U.S.C. 922 for the sale of a "firearm" which also comes within the definition of a "firearm" under Title 26; the policy is to prosecute only under Title 26. Prosecution under Counts III and VI (the Title 18 counts) involving the hand grenades is inconsistent with this govern-

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[1] *United States* v. *Schofer*, 310 F. Supp. 1292 (E.D.N.Y., 1970), cited by petitioner, was based on an erroneous interpretation of the immunity provision of 26 U.S.C. 5848 which has been overruled by this Court's decision in *Freed*.

ment policy since the hand grenades were also the subject of Title 26 counts. In these circumstances, if the Court deems it appropriate to reach Counts III and VI, we would not oppose entry of an order vacating conviction under them. See *Petite* v. *United States*, 361 U.S. 529.

Petitioner's remaining contentions (Pet. Questions 3 and 4, Pet. 17-31) are answered by the opinion of the court of appeals on which we rely (Pet. App. A 3-4, 6-7).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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